

Center on
Juvenile and
Criminal
Justice

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Report

"Three Strikes": The New Apartheid

by

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"You can probably shut down all crime, if you're willing to burn down the village to save it. Eventually, I think there will be a backlash, and crime will go back up."

former New York City Police Commissioner Raymond Kelly

INTRODUCTION

For most African Americans and Americans in general, the month of February has come to represent a time of pride, celebration and appreciation for the contributions made by blacks in the history of the United States. March, the month in which California's "Three Strikes and You're Out" law was passed, is rapidly becoming associated with segregation, division, and inequality.

The images of the beating of Rodney King, the uprising following the acquittal of the police officers involved in that beating, the O.J. Simpson trial, and student protests over the UC Regents' decision to end Affirmative Action have focused the national spotlight on California, effectively labelling the state as a flash point for the rapidly increasing polarization of race relations. California's criminal justice system has been the source of the closest scrutiny. As politically expedient "get tough" stances have monopolized the debate on crime, political one-upsmanship has produced the most punitive, expensive and racially disparate criminal justice policies in the state's history.

If disturbing biases in arrest and incarceration rates before "Three Strikes" rekindled the fire of inequality, "Three Strikes" is fanning the flames which threaten to burn the village. On the second anniversary of "Three Strikes"¹, many of the dire predictions of its opponents are coming true. Throughout California, local justice systems are struggling under the burden of the increased caseloads, non-violent offenders are receiving lifetime sentences, and minorities are being disproportionately targeted for prosecution. Normally, while 94 percent of all felony cases are disposed of through plea bargaining, far fewer are agreeing to plead in the area of "Three Strikes"². Fully 85% of those sent to state prison under "Three Strikes" are sent for non-violent offenses³. The financial burden of "Three Strikes" is proving more cumbersome than early predictions. Los Angeles County recently submitted a test claim to the Commission on State Mandates, seeking reimbursement of \$169 million from the state for the costs of "Three Strikes" in '94-'95 and '95-'96. LA County officials estimate that jail and legal system costs for just that one county may reach \$300 million next fiscal year⁴.

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DATA ANALYSIS: AFRICAN AMERICANS AND "THREE STRIKES"

While financial burdens and draconian sentences are formidable problems which have been consistently debated, a disturbing trend of selective incarceration through "Three Strikes" has only recently become an issue. In a study authored by the Center on Juvenile and Criminal Justice on the state of criminal justice control in California issued less than a month ago, it was reported that nearly four in ten African American men in their twenties are under some form of criminal justice control in California. These data barely reflect any of the impact of the relatively new "Three Strikes" law.

At the second anniversary of "Three Strikes", data provided by the California Department of Corrections (CDC), the Department of Finance, and the California Department of Justice indicate that racial disparities in the incarceration of African Americans under "Three Strikes" is sharply increasing the already dramatic overrepresentation of African Americans behind bars. The California Department of Corrections' projections suggest that the prison population will be increasingly dominated by inmates sentenced under the "Three Strikes" law, further exacerbating the overrepresentation of African Americans in prison.

- While African Americans make up 7% of the California's population, and constitute 23% of felony arrests, they make up 31% of the prison population and 43% of third "strike" defendants sent to state prison thus far. (See Graph I) Conversely, whites who make up 53% of California's population and constitute 33% of felony arrests statewide, make up 29.5% of state prisoners and only 24.6% of third "strike" prisoners.⁶ (See Graph II)
- Put another way, African Americans are being arrested for felonies at 4.7 times the rate of whites; being incarcerated at 7.8 times the rate of whites; and being imprisoned for a third "strike" at 13.3 times the rate of whites.⁷ (See Graph III)

- Currently, two and three "strikers" represent 8% of the prison population. Based on CDC estimates, two and three "strikers" will represent 49% of the prison population by the year 2024. As such, if this 13 fold overrepresentation for African Americans continues, the current starkly disparate incarceration rate for blacks will substantially worsen under "Three Strikes."

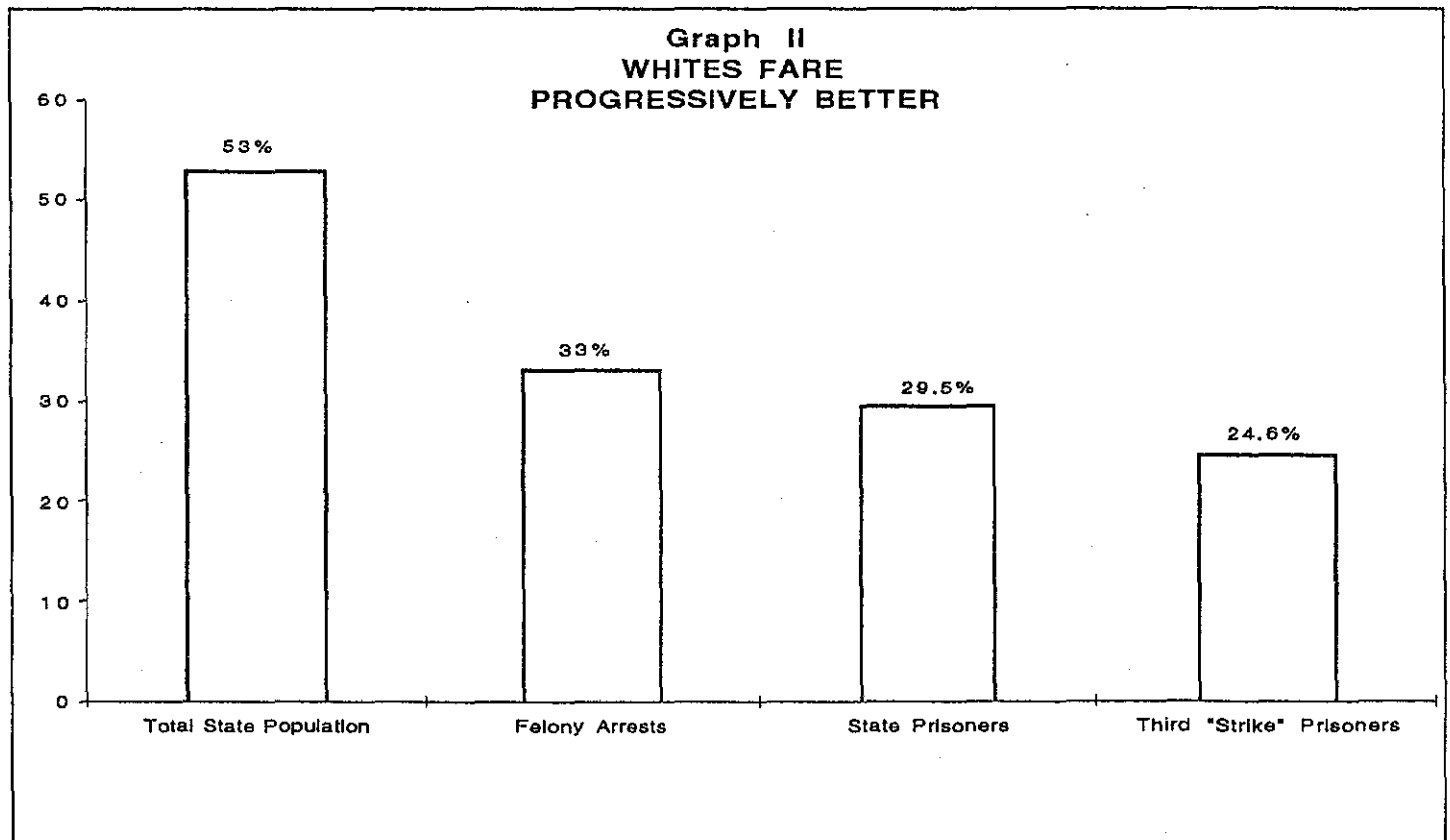
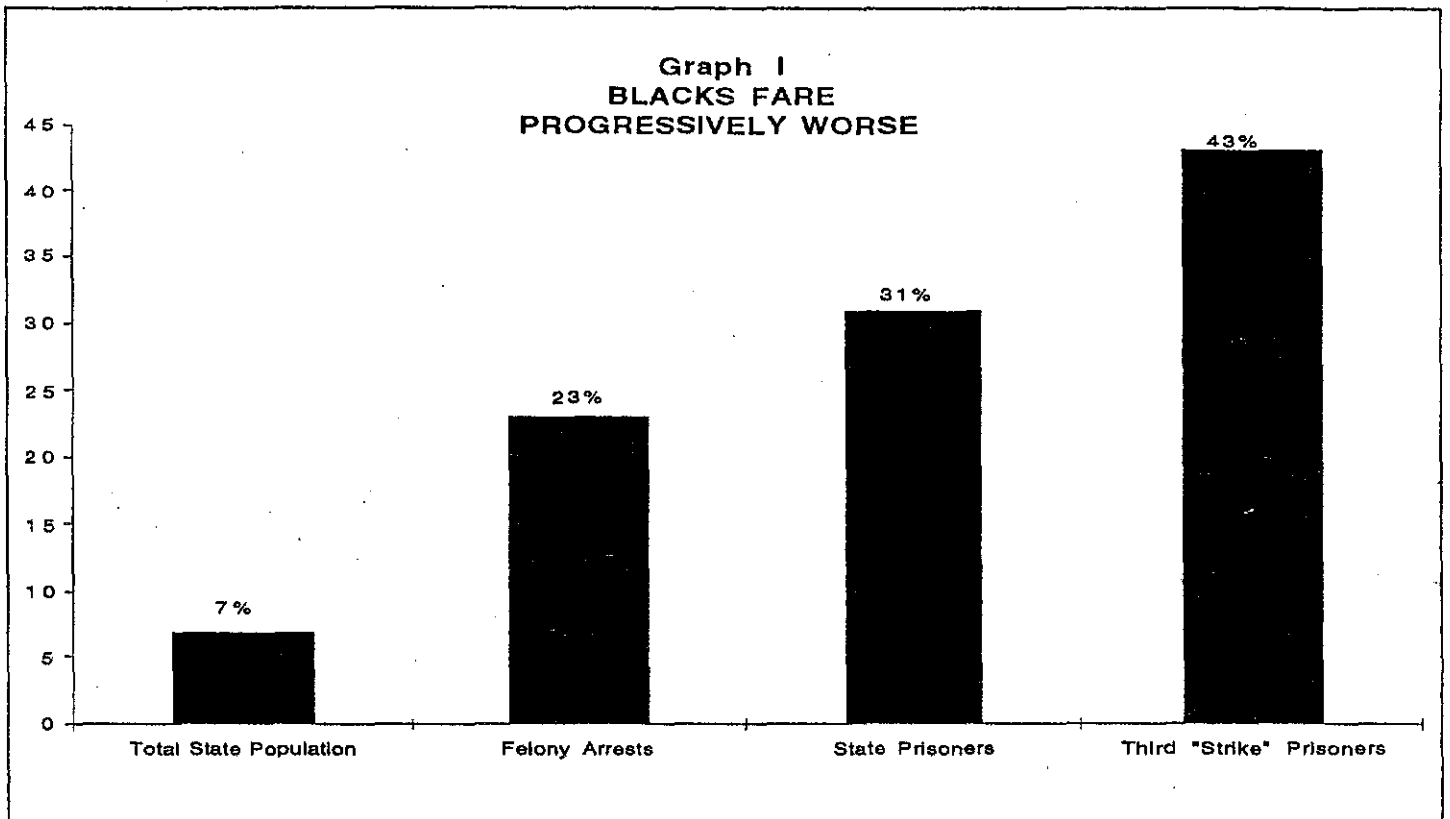
DATA ANALYSIS: CALIFORNIA DISTRICT ATTORNEYS OFFICES

An often ignored element in the public debate over "Three Strikes" is the degree of power and discretion wielded by District Attorneys in California's criminal justice system. As California's criminal justice system employs a rigid determinate sentencing system and actively enforces "Three Strikes" legislation, a significant amount of power is relocated into the hands of those who control the flow into the criminal justice system. In this vein, prosecutors play an important role in determining which defendants are charged and what crimes they are charged with.

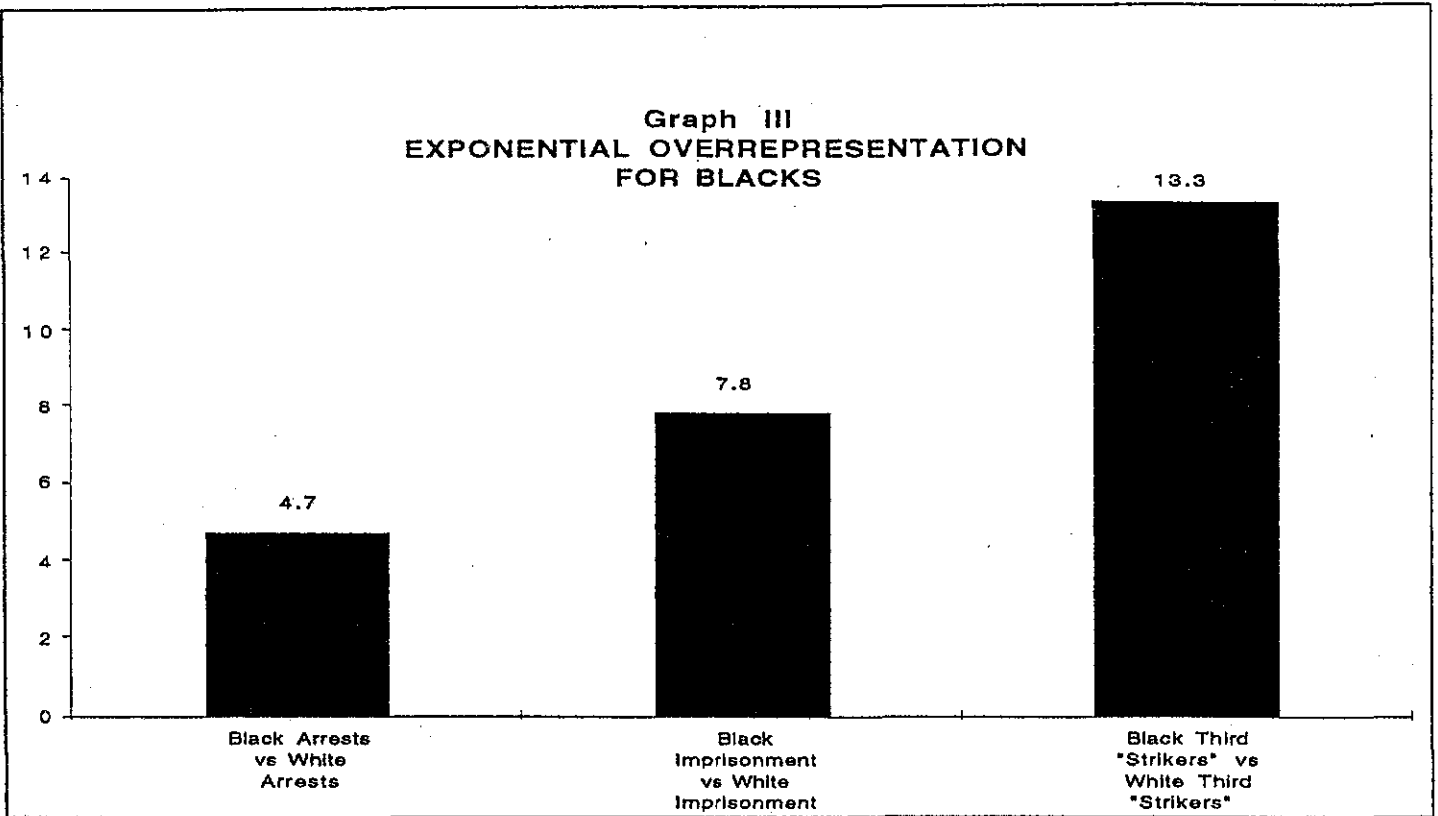
Increasingly, the location of scrutiny for biases in the criminal justice system has changed from judges and juries to the police and prosecutors. The Honorable Theodore A. McKee, a Circuit Court Judge with the Third Circuit Court of Appeals, elaborates on the emerging crisis:

Bias creeps into the system at less obvious levels, at the level where an individual's discretion determines who gets arrested, who gets prosecuted, how the guilty are sentenced, and who gets these mandatories. When you look at who gets prosecuted and who gets diversion, the judiciary has no say there. It is totally up to the mind-set of the prosecutor. This is why it is important to have more blacks involved in the policy-making levels within the prosecutor's office.⁹

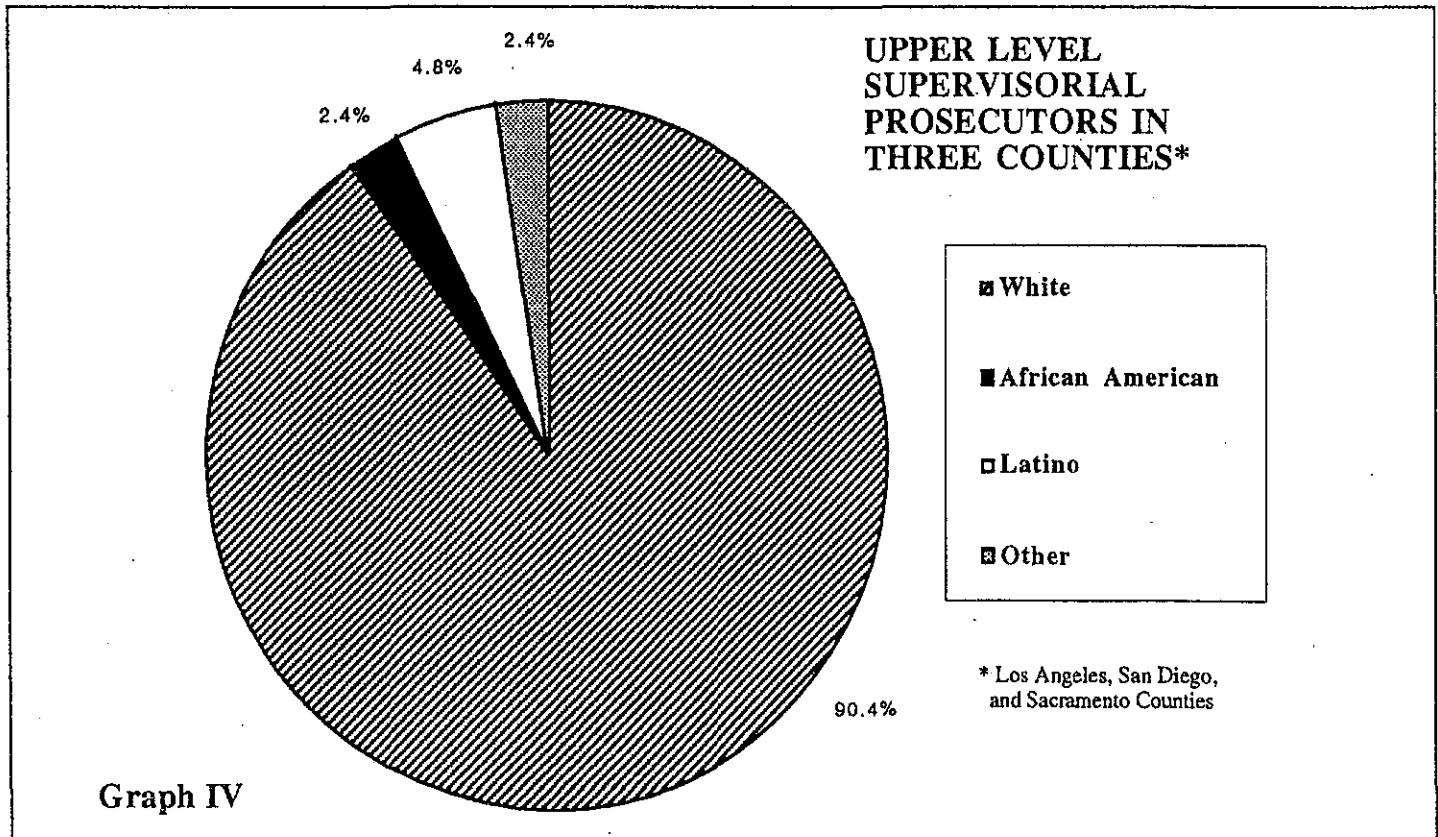
Data from the CDC and selected District Attorneys offices suggests that the emerging bias has not been alleviated in California.



Graph I and II SOURCES: California Department of Corrections, California Department of Justice, California Department of Finance



Graph III SOURCES: California Department of Corrections, California Department of Justice, California Department of Finance



SOURCE: Offices of Affirmative Action in Los Angeles, Sacramento, and San Diego Counties.

- The CDC reports that five counties - Los Angeles, Orange, Sacramento, San Bernadino, and San Diego - account for 70 percent of all inmates sentenced under "Three Strikes"¹⁰.
- Based on data received or reported from each respective office, only 5% of the prosecutors in these county's were African American. Eighty-two percent of prosecutors in those counties are white, 8% Latino, and 5% other. Of the 1586 prosecuting attorneys these counties employed, only 82 were African American.
- In three counties (Los Angeles, San Diego and Sacramento counties) which account for over 50 percent of the incarcerated two and three strikers, the highest ranking prosecutor positions are reserved for whites. Over 90% of the upper level supervisory prosecutors are white in these counties, while 2% are African American. Another 5% are Latino, and the "other" category accounts for 2%. (See Graph IV)

At the present time, legislation has been introduced in Sacramento which may further exacerbate disparate charging practices. AB 1018 would give District Attorneys sole discretion to decide whether it is in the interest of justice to count prior "strikes". Similarly, in *People v. Romero*, a case pending before California's Supreme Court, the issue of where discretion over including prior "strikes" should lie - in the hands of judges or prosecutors -- will be decided.

THE RAGING FIRE

Last month, Californians learned that nearly 4 in 10 of their young black males were under some form of sentence, an astonishing rate of criminal justice control. The data reported in this analysis suggest that, unless dramatic action is taken soon, Californian's will look back to 1996 as the "good old days" in terms of race relations and the criminal justice system.

On the 400 mile trek from Sacramento to Los Angeles, the California traveller is never

more than 40 minutes from a branch of California's fastest growing industry - the state prison system¹¹. The reported data on the underrepresentation of African Americans in District Attorney's offices and the recent revelations of racism in the LA police force brought about by the Rodney King beating and the Furhman tapes raises a serious question: Have we eliminated racial biases in the criminal justice system or simply relocated the biases? Not since the days of the all white juries and state sponsored discrimination under Jim Crow laws has the United States seen such a dramatic display of systematic overrepresentation in its public policies. "Three Strikes and You're Out" can truly be said to be California's Apartheid.

The larger picture shows that the criminal justice system is not the only system to degenerate into de facto segregation. A state which once prided itself on making education, employment, water, and transportation accessible to all of its inhabitants is increasingly associated with segregation and degenerative public policies. Recently, state spending on corrections surpassed higher education. According to a Rand Corporation study, constitutional constraints on spending and the effects of Proposition 13 will ensure that higher education will continue to suffer in the future at the expense of corrections¹². The combined threat of the end of Affirmative Action, more costly and less available public higher education, and drastically increasing overrepresentation of African Americans behind bars as a result of "Three Strikes", suggest a bleak if not desperate future for African Americans.

RECOMMENDATIONS

Contrary to recent suggestions, tinkering with the current "Three Strikes" law either by promoting affirmative action policies in DA's offices or requiring that the third "strike" be a violent offense would neither reduce inherent flaws nor repair past damage. Large net criminal justice policies such as "Three Strikes" are particularly susceptible to bias. "Three Strikes" is inherently and drastically flawed, and as

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long as the system stands then bias will creep in from all directions. The lesson learned on the road from separatist 50's segregation to divisive 90's anti-affirmative action proposals is that every year we spend tinkering with unjust laws will be one more year down the road in which government must repair its social damage with more unpopular legislation.

In an effort to address some of the biases in the current criminal justice system, and to promote a more equitable system into the next millennium, the Center on Juvenile and Criminal Justice urges the immediate implementation of the following recommendations:

- **Abolition of the "Three Strikes and You're Out" law and the establishment of a Sentencing Commission**

The state should immediately empanel a commission to revamp California's Penal Code and to reaffirm rehabilitation as a meaningful goal of sentencing. The commission should ensure that prison populations do not exceed capacity by enacting a policy of "honesty in sentencing legislation" mandating that funds to build and operate sufficient prison beds be available when legislation increasing the use of imprisonment is passed. While the commission is developing its recommendations, the state should suspend all prison construction and enact a moratorium on piece-meal criminal justice legislation.

The commission should be charged with the duty of doing what "Three Strikes" has failed to do -- reserving prison space for violent recalcitrant offenders, and not wasting massive public resources on incarcerating young men -- generally with black and brown faces -- who have committed non-violent offenses.

- **Enact a Community Corrections Act**

In California, when a county places a defendant on probation and sends him or her to a community-based treatment program, the county pays the entire bill for the supervision and treatment of that offender.

When local funds are not available for treatment, the option of state prison for poor, non-violent minority offenders becomes more systemically appealing. Passage of a Community Corrections Act would help reduce the incarceration of low-level offenders by compensating counties for keeping them locally in intensive supervision and/or drug treatment programs. Senate Bill 760, authored by Senator Bill Lockyer, is a good start toward such a comprehensive statewide act. Such an act would help prevent thousands of unsophisticated offenders from entering the prison system, where they often learn more in a week about violent behavior than they have in a lifetime on the streets.

- **Aggressive outreach to communities of color by District Attorney's Offices throughout the state for both recruiting and collaborative problem-solving on the issue of racial disparity in the criminal justice system.**

The California District Attorneys Association (CDAA) has largely been a vehicle for longer sentences and more control by DA's over the criminal justice process, ignoring racial inequality in its ranks and policies. That can no longer persist.

At its highest level, the CDAA must work collaboratively and seriously with civil rights organizations and communities of color throughout California to address the serious and worsening racial and ethnic disparity evident in California's criminal justice system. It is no longer sufficient to conclude, as conservative criminologist James Q. Wilson recently has, that the overrepresentation evident in the above data merely "represent an unhappy fact" about crime in our inner cities. The CDAA must move beyond such glib protestations to a meaningful discourse with African American and Latino leaders, as well as others, to develop broad-based and workable solutions to this problem.

METHODOLOGY

Arrest and incarceration rate data were derived simply by dividing the raw numbers of those arrested and incarcerated by the general population for respective race/gender cohorts. Arrest data were obtained from the California Department of Justice, general prison population data and data on "Three Strikes" prisoners were obtained from the California Department of Corrections, and general population data were obtained from the California Department of Finance.

Data on the racial make-up of District Attorneys Offices in Los Angeles, Orange, Sacramento, San Bernadino, and San Diego Counties were obtained either by contacting the District Attorneys Offices themselves, or the human resources divisions of county government in the respective counties. Data for management level positions was only available in the three counties analyzed.

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Layout by:
 Joyce Miller

FOOTNOTES

1. The "Three Strikes and You're Out" bill was signed into law on March 7, 1994.
2. "The Impact of the "Three Strikes and You're Out" Law on California's Justice System." California Legislative Analyst's Office, 1996.
3. "The Impact of the "Three Strikes" Law on the California Department of Corrections." The California Department of Corrections, 1996.
4. "The Impact of the "Three Strikes and You're Out" Law on California's Justice System". The Legislative Analyst's Office, 1996.
5. Vincent Schiraldi, Sue Kuyper, and Sharen Hewitt, "Young African Americans and California's Criminal Justice System: Five Years Later", 1996.
6. "Two Strike Cases by Ethnic and Sex, December 31, 1995" and "Third Strike Cases by Ethnic and Sex, December 31, 1995". California Department of Corrections, Data Analysis Unit, 1995.
 "Population Projections". California Department of Finance, Demographic Research Unit, 1993.
 California Department of Justice, division of Law Enforcement, 1994.
7. "Third Strike Cases by Ethnic and Sex, December 31, 1995" and "Two Strike Cases by Ethnic and Sex, December 31, 1995". California Department of Corrections, Data Analysis Unit, 1995.
 "Total Institution Population by Ethnic Group and Sex and Commitment Type". CDC, Data Analysis Unit, 1995.
 "Adult and Juvenile Arrests Reported, 1994: Race and Ethnic Group". California Department of Justice, Division of Law Enforcement, 1994.
 "Total Population by County by Year By Race/Ethnicity, 1993 Population Projections Series:1970-2020". Department of Finance, Demographic Research Unit, 1993.
8. "Third Strike Cases by Ethnic and Sex, December, 31, 1995" and "Two Strike Cases by Ethnic and Sex, December 31, 1995", CDC, Data Analysis Unit, 1995.
 "Total Institution Population: Ethnic Group by Sex and Commitment Type, Dec. 31, 1995", CDC, Data Analysis Unit, 1995.
 "Two and Three Strike Institution Populations: Fall 1995 Projections (through 2024)", CDC, Data Analysis Unit, 1995.
9. Linn Washington, Black Judges on Justice: Perspectives from the Bench. The New York Press: New York, 1994.
10. "The Impact of "Three Strikes" Law on the California Department of Corrections", CDC, 1995.
11. Lin Newman, "California Behind Bars." San Francisco Focus, November, 1995.
12. "Three Strikes and You're Out: Estimated Benefits and Costs of California's New Mandatory-Sentencing Law", The Rand Corporation, 1994.

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The Center on Juvenile and Criminal Justice is a public policy organization which engages in research and provides technical assistance on criminal and juvenile justice issues.